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## Quality of Reasoning in International Criminal Tribunals

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## Introduction

In 1996 Mohamed Shahabudeen, then a judge at the International Court of Justice (ICJ), gave the annual Herch Lauterpacht Memorial Lecture at Cambridge University. The topic of the lecture, later published in a book, was “*Precedent in the World Court*”<sup>1</sup>. In it he spent more than 200 pages discussing different aspects of ICJ judgments, including: the possibility of judge-made law, *stare decisis*, distinguishing and departing from previous precedents, *ratio decidendi* and *obiter dictum*. In short, he discussed the various techniques that the ICJ uses in its everyday business – the main particles of which international law (at least as long as it is found in judgments) is made of.

It’s an excellent read. Being steeped both in Common Law and Continental Law tradition, Shahabudeen makes the reading of the ICJ’s work, its single most important outcome – the written judgment, approachable. For scholars of international courts, it’s a must read. And yet, if one wishes to find any guidance as to what constitutes a good judgment or a good legal argument, this is not the place to find it. And there are several reasons for that.

For one, international law scholars read international judgments with reverence. In a recent book<sup>2</sup> on interpretation in international law, Bianchi writes that “international lawyers ... do tend to look at the law ... from the perspective of the judicial function” and that “this is in conformity with the utter deference that international lawyers show towards international courts.”<sup>3</sup> This reverence towards the written judgment is shared not only by practitioners, but by academics as well, despite the fact that they are expected to “keep some distance from the object of their intellectual inquiry”.<sup>4</sup>

Second, the rise of international courts is a recent phenomenon. At the end of the Cold War, there were six international courts in existence; by 2013 there were 23 new courts on top of that.<sup>5</sup> It was an explosion of new judicial institutions and we are finally starting to catch up to its consequences, such as the challenge that they have brought to the standard account to international law’s legitimacy.<sup>6</sup>

Third, at least when it comes to international courts, there seems to be a fragmentation at work, not only in the sense that international courts are predominantly tied to different

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<sup>1</sup> Mohamed Shahabudeen, *Precedent in the world court* (Cambridge University Press 2007).

<sup>2</sup> Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in international law* (Oxford University Press 2015)

<sup>3</sup> Andrea Bianchi, ‘The Game of Interpretation in International Law: the Players, the Cards, and Why the Game is Worth the Candle’ in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015), p. 41.

<sup>4</sup> Bianchi, Peat and Windsor p. 41.

<sup>5</sup> See the Taxonomic Timeline chart in Cesare Romano, Karen J. Alter and Yuval Shany (eds), *The Oxford handbook of international adjudication* (Oxford University Press 2014)

<sup>6</sup> For more on this topic see Armin von Bogdandy and Ingo Venzke, *In whose name?: a public law theory of international adjudication* (Oxford University Press 2014) Armin von Bogdandy, Philipp Dann and Matthias Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’ in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer Berlin Heidelberg 2010) <[http://dx.doi.org/10.1007/978-3-642-04531-8\\_1](http://dx.doi.org/10.1007/978-3-642-04531-8_1)> Armin von Bogdandy and Ingo Venzke, ‘Beyond Dispute: International Judicial Institutions as Law-makers’ 12 German Law Journal 979

international regimes,<sup>7</sup> but in the sense that the view of their purpose, of what is it that they are supposed to do, is fractured.<sup>8</sup>

And finally, until recently<sup>9</sup> International Law was not seen as a legal system in the traditional sense by non-international law scholars. As such the theories and frameworks that were developed to measure the quality of justice nationally, were never exported or adapted to look at the international courts. Consequently, there are few, if any, standards of what is understood as a good judgment. In many ways, for the community of international lawyers, the criteria for what is a good judgment or good judicial reasoning are *ad hoc* in the true sense that justice Potter Stewart meant when he said “I know it when I see it”.<sup>10</sup>

In this Chapter, I will piece together some general rules of thumb that have been created in the branch of International Criminal Law to assess the quality of reasoning of the different International Criminal Courts. My focus will be the work of the International Criminal Court (ICC), although the work of the ICC rests to a large degree on the work of the previous *ad hoc* tribunals. As such, I will analyse the criticisms that have been levelled at the international criminal tribunals in terms of their interpretation and reasoning, highlight some of the continuing concerns and assess the ICC’s current practice.

### International Criminal Law at a Glance

Unlike national legal systems, international criminal law, until the creation of the ICC, was a diffused affair. It was diffused in several ways: firstly, as a branch of public international law, the sources of legal norms was (and still is) scattered across different treaties and, in a significant number of instances, in customary norms and general principles of law.<sup>11</sup> It is a patchwork of legal obligations to which some states may be part of but others not. So much so that when the first post-Cold War *ad hoc* tribunal was created, the International Criminal Tribunal for Yugoslavia (ICTY), the UN Secretary General had to specify in his report to the Security Council that the ICTY should only apply rules of international humanitarian law that were “beyond any doubt part of customary law”<sup>12</sup> at the time of the commission of the acts.

Secondly, as the previous paragraph alludes to, there was not one single institution responsible for enforcing international criminal law. Rather, until the early 1990s there were only two instances of international courts trying individuals, the Nuremberg tribunal and the International Criminal Tribunal for the Far East (ICTFE), both dealing with atrocities stemming from the Axis countries in World War II. It is not that individuals were not tried for international crimes before World War II<sup>13</sup>, it is just that this was done through national tribunals using domestic criminal procedure.<sup>14</sup> Since the end of the Cold War there have been

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<sup>7</sup> Martti Koskenniemi and Päivi Leino, ‘Fragmentation of international law? Postmodern anxieties’ 15 *Leiden Journal of International Law* 553; Martti Koskenniemi, ‘Hegemonic Regimes’ in Margaret Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2011).

<sup>8</sup> See the discussion in Chapter 2 of Bogdandy and Venzke pp. 28-100 analysing the different conceptions of the functions of international courts.

<sup>9</sup> See for e.g. Jack Goldsmith and Daryl Levinson, ‘Law for states: International law, constitutional law, public law’ 122 *Harvard Law Review* 1791; Mehrdad Payandeh, ‘The Concept of International Law in the Jurisprudence of H.L.A. Hart’ 21 *European Journal of International Law* 967;

<sup>10</sup> Concurring Opinion of Justice Stewart in *Jacobellis v. Ohio*, 378 US 184 (1964) p. 197.

<sup>11</sup> Antonio Cassese, *International Criminal Law* (2<sup>nd</sup> ed.), (Oxford University Press, Oxford, 2008), p. 3.

<sup>12</sup> Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. No. S/25704, 3 May 1993, para. 34.

<sup>13</sup> See Michael R. Marrus, *The Nuremberg War Crimes Trial 1945-46: a Documentary History*, (Bedford Books, Boston, New York, 1997), pp. 1-14.

<sup>14</sup> Also see Gary Jonathan Bass, *Stay the hand of vengeance : the politics of war crimes tribunals: with a new afterword by the author* (Princeton; Oxford; Princeton University Press 2000).

not only the *ad hoc* international tribunals (ICTY and the International Criminal Tribunal for Rwanda, ICTR) but also mixed international/national tribunals, like the Special Court for Sierra Leone (SCSL) who use a mixture of national (usually procedural) and international (usually substantive) criminal law in their proceedings.

Thirdly, the consequence of having so many international/internationalized institutions applying international criminal law is that international criminal procedure was left, to a large extent, at the discretion of the judges themselves. This does not mean that the procedural requirements at the different courts were wildly different, however, since the drafters of the statutes put a common requirement of respecting the fair trial rights of the accused as understood in international human rights instruments.<sup>15</sup> Moreover, despite this scattering of substantive and procedural law, including the institutions tasked in applying them, there has been a remarkable cohesion and cross referencing between the different institutions. To an overwhelmingly large extent, what is understood to be a crime within the ICTY is also a crime for the ICTR and SCSL, for example. Similarly, the written opinions between these institutions is strikingly similar in both form and substance, something that I will go into more deeply in this Chapter.

In part, the establishment of the ICC was meant to change the fractured landscape of international criminal law, and to remove the need for having multiple institutions applying the “same” law. Therefore, with the creation of the Rome Statute<sup>16</sup> the drafters set up both the substantive law – the core international crimes – and the procedural law through specific articles in the statute. They later supplemented them by issuing the Elements of Crimes<sup>17</sup> and the Rules of Procedure and Evidence<sup>18</sup> through the ICC’s Assembly of State Parties.

While for those states that have not signed up to the Rome Statute the fractured system still remains for the core international crimes (Genocide, War Crimes, Crimes Against Humanity and Aggression), for the those that did sign up to it, the Rome Statute system is the best route available. As of November 2016, the number of Member States to the Rome Statute was 124, with a total of 139 signatories,<sup>19</sup> although this was the time that we saw, for the first time, several declarations of withdrawal from the Statute.<sup>20</sup> While the ICC has been up to a slow start, it has had enough judgments and decisions to make a preliminary analysis of its quality of reasoning in its written judgments.

### **The Legal Authority for the Issuing of Judgments**

The ICC draws its authority to issue binding decisions from the Rome Statute. Article 74, in no uncertain terms, states that “[t]he decision shall be in writing”,<sup>21</sup> that it “shall be based

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<sup>15</sup> For instance, see Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. No. S/25704, 3 May 1993, para. 106-107.

<sup>16</sup> Rome Statute of the International Criminal Court, United Nations, Treaty Series, vol. 2187, p. 3.

<sup>17</sup> ICC, Elements of Crimes, 2011, ISBN No. 92-9227-232-2, available at: <http://www.refworld.org/docid/4ff5dd7d2.html> [accessed 19 September 2016].

<sup>18</sup> ICC, Rules on Procedure and Evidence, 2013, ISBN No. 92-9227-278-0, available at: <https://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf> [accessed 19 September 2016].

<sup>19</sup> See Status of Ratifications of the Rome Statute, available at: [https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg\\_no=XVIII-10&chapter=18&lang=en](https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=XVIII-10&chapter=18&lang=en) [accessed 19 September 2016].

<sup>20</sup> At the time of writing three states issued their withdrawals from the Rome Statute: Burundi, Gambia and South Africa, *Gambia withdraws from International Criminal Court*, Al Jazeera, 26 October 2016, available at: <http://www.aljazeera.com/news/2016/10/gambia-withdraws-international-criminal-court-161026041436188.html> (last visited 4 November 2016).

<sup>21</sup> Article 74(5) of the Rome Statute

on its evaluation of the evidence and the entire proceedings”<sup>22</sup>, and “shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions.”<sup>23</sup> It urges unanimity, but allows for a decision to be taken by a majority of judges<sup>24</sup> and also allows for the judges in the minority to attach separate or dissenting views.<sup>25</sup> The summary of the decision is to be delivered orally in open court.<sup>26</sup>

In addition, Article 74 contains further mandatory instructions regarding the content that a judgment might have. Not only does it require a reasoned statement of the findings, but it also limits the materials that those findings can be based on. It specifies that “[t]he decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges”<sup>27</sup> and that it “may base its decision only on evidence submitted and discussed before it at the trial.”<sup>28</sup> The reasons for these limitations is the protection of the fair trial rights of the accused in the sense that the judges can only use the evidence that has been discussed in trial, consequently giving the accused ample warning and time for them to challenge the evidence.

ICC has had plenty of opportunity to clarify the obligations of Article 74. In the *Bemba Gombo* judgment<sup>29</sup> it said that it understands the requirement for the evidence to be discussed at trial to mean that the evidence

encompasses not only oral testimony, together with any documents and other items, such as video recordings, that were ‘discussed’ during the hearings, but also items of evidence that were ‘discussed’ in the written submissions of the parties and Legal Representatives at any stage during the trial.<sup>30</sup>

Moreover, the evidence need not be specifically referenced in the parties’ final submissions, but could have been introduced at any point during the trial, so long as the defence has had opportunities to challenge the evidence during the trial.<sup>31</sup> Furthermore, the ICC has said that it is “required to carry out a holistic evaluation and weighing of *all the evidence taken together* in relation to the fact at issue”<sup>32</sup> meaning that it is not obligated to refer to every single piece of evidence but to take the evidence in its totality.<sup>33</sup>

### **Format and Length of Judgments**

The format of the judgments issued by the ICC can be discussed on two levels: on the formal level of title, parties, summary, reasoning and dispositive, and on the form that the different elements within the substantive part of the judgment – the reasoning itself – can take. The latter is influenced more by the type of judgment i.e. whether it is a Trial or an Appeal Chamber judgment, its length and the complexity of the matter itself.

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<sup>22</sup> Article 74(2) *ibid.*

<sup>23</sup> Article 74(5) *ibid.*

<sup>24</sup> Article 74(3) *ibid.*

<sup>25</sup> Article 74(5) *ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> Article 74(2) *ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> ICC, Trial Chamber III, *Judgment pursuant to Article 74 of the Statute, The Prosecutor v Jean-Pierre Bemba Gombo*, N° ICC-01/05-01/08, 21 March 2016 (hereafter *Bemba Gombo* judgment) .

<sup>30</sup> *Ibid* para. 224.

<sup>31</sup> *Ibid* para. 225.

<sup>32</sup> ICC, Appeals Chamber, *Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Prosecutor v Thomas Lubanga Dyilo*, No. ICC-01/04-01/06 A 5, 1 December 2014, para. 22 (emphasis in original).

<sup>33</sup> *Bemba Gombo* judgment, para. 227.

On the formal level, all judgments have the name of the court in both French and English, the language of the original judgment (either French or English with one being the authoritative), the name of the Chamber that issued the judgment (i.e. Trial Chamber or Appeals Chamber), the case name (usually consisting the form of Prosecutor v name(s) of the accused and the situation in relation to which the case is brought up, and whether it is a final judgment or a decision on certain points during the trial itself), the case number and the date of issuance. Moreover, it is standard to also have the name and title of the judges sitting in the trial, the leading members of the prosecution, the defence team, the representatives of the Victims and the name of the court Registrar.

Additionally, within the substantive part of the judgment, when talking about Trial Chamber judgments, there is generally a summary of the case and the procedural steps taken as well as certain general observations on the peculiarities that are common throughout the case such as observations on the general reliability of the witnesses, the victim participation during the trial or any problems regarding cooperation with the court that the Chamber might have encountered. This is then usually followed by the substantive discussion on the nuts and bolts of the case, namely the various charges and the law, the evidence presented and the conviction of the judges. In addition, depending on whether it is a Trial or an Appeals Chamber the judgment ends with either a dispositive or a pronouncement of relief, respectively, signed by the judges.

However, within the substantive part of the judgments there is a sort of further formulaic way in which the judgments are crafted. While the organization of the presentation of the judges reasoning can be made in many ways, (e.g.: according to the counts charged by the prosecutor; chronologically according to the way that the conflict unfolded; or geographically according where the crimes were committed), within each organizing unit there is a certain form that the argument takes. Most notably it starts with summarizing the factual situation as determined by the evidence taking a particular note of the kind of evidence that was used, then it discusses the general requirements of the substantive law on the issue, taking note of the elements that need to be proved, (i.e. the elements of the crimes), and then goes on to discuss the specific elements and the requirements for the specific elements. In that sense the judgment unfolds as series of syllogisms with an intricate pattern of unfolding elements going down a tree branch ending with a specific conclusion on each element.

This structure of the written judgment, I claim, has at least two sources: one is the length and complexity of the proceedings and second is the tradition in which international criminal law operates, that of public international law. When it comes to the length of the judgment a typical judgment has over a hundred pages in length, with some having over a thousand. For instance, the recent *Prosecutor v Karadžić* judgment (ICTY) had over 2600 pages,<sup>34</sup> the recent *Bemba* Trial Chamber judgment<sup>35</sup> (ICC) has over 320, while the *Aleksovski* Appeals Chamber Judgment (ICTY)<sup>36</sup> has 87 pages.

Which brings us to the complexity of the trials. International criminal trials have long been criticized for their length of proceedings.<sup>37</sup> For instance, in the *Karadžić* case<sup>38</sup> the time

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<sup>34</sup> For e.g. see ICTY, *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Trial Chamber Judgment, 24 March 2016 which has over 2600 pages.

<sup>35</sup> ICC, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, *The Prosecutor v Jean-Pierre Bemba Gombo*, N° ICC-01/05-01/08, 21 March 2016.

<sup>36</sup> ICTY, *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Appeals Chamber Judgment, 24 March 2000.

<sup>37</sup> For an overview of the critics and some answers to the issues of complexity and time see the introduction in Stuart Ford, 'Complexity and Efficiency at International Criminal Courts' [Emory University School of Law] 29 *Emory International Law Review* 1, pp. 1-6.

<sup>38</sup> For a graphic timeline see the ICTY case information sheet on the *Karadžić* trial available at: <http://www.icty.org/en/cases/radovan-karadzic-trial-key-information> (last visited on 11 October 2016).

it took from the Prosecutors opening statement to the delivery of the Trial Chamber judgment was six years and six months, while the first indictment in the case was filed in June 1995. Recently, Ford measured the complexity of the trials at the ICTY using three criteria: legal complexity, factual complexity and participant complexity.<sup>39</sup> Based on these criteria, the trials conducted at the ICTY were scored to be “the most complex set of related criminal cases that has ever been tried by any court anywhere”.<sup>40</sup>

It is not difficult to see why. For e.g. the international criminal law is wrought with legal complexity, not simply because of the fact that its substantive law is scattered in multiple sources (treaties) and even in unwritten ones like international custom, or basic legal principles common to most nations. Even when we take into account a unified source like the ICC’s Statute, the nature of the crimes makes the law complex. For instance, the crime of Crimes Against Humanity has general and specific elements which need to be proved such as: *wide spread* or *systematic*, *attack on a civilian population*, *with knowledge* of the attack, as general elements.<sup>41</sup> Moreover, once these general elements are discussed, the specific elements of the crime need to be tackled; for instance in the crime of torture those would be that

- 1) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
- 2) such person or persons were in the custody or under the control of the perpetrator, and
- 3) such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.<sup>42</sup>

And this is just one subsection of one criminal provision, Crimes Against Humanity, which in the ICC statute has ten other “ways” in which it can be carried out. The crime of War Crimes is even more complex, since the nature of international humanitarian law being such as it is, it is necessarily divided into war crimes committed in international and non-international conflicts, each subdivided into further slots of wilfully killing, torture, pillage etc.<sup>43</sup>

Moreover, the possibility of factual complexity can become even more daunting. For instance, the ICTY has jurisdiction over the wars in former Yugoslavia, spanning the territories of today’s Bosnia and Herzegovina, Croatia, Serbia, Kosovo and Macedonia, dealing with three separate conflicts (seen in a timeline) – 1991-1995 (Bosnia, Croatia and Serbia), 1999 (Kosovo) and 2001 (Macedonia). Should the Milosevic trial have come to its desired end, the trial would have spanned the factual situations in three States and nine years of conflict and political turmoil. This translates into a large number of facts that need to be established through the examination of witnesses and documents, which may or may not be entered into evidence and be assigned as specific document number.

The number of participants involved in the criminal process itself can also be quite daunting. While international criminal law follows the similar tripartite structure of most criminal trials (prosecutor, defendant and judge) the number of participants can still hover around the one hundred mark if we take into account the number of witnesses that can be called in one trial. Moreover, in a large number of cases there is more than one defendant standing trial.<sup>44</sup> This is before we take into account the Rome Statute’s provisions regarding victim

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<sup>39</sup> Ford, pp. 12-13.

<sup>40</sup> Ibid p. 6.

<sup>41</sup> Article 7 of the Rome Statute.

<sup>42</sup> Elements of Crimes, p. 7 [Article 7(1)(f)].

<sup>43</sup> See Article 8 of the Rome Statute (War Crimes) which spans a little over four pages.

<sup>44</sup> Ford, pp. 17-19.

participation<sup>45</sup> where the victims themselves have the right to appoint representatives that can file motions and present additional facts and arguments during the trial. If we take Ford's data as an example, the *Lubanga* trial<sup>46</sup> at the ICC "involved 204 trial days, 67 witnesses, and 1373 exhibits."<sup>47</sup> And this is only the median trial regarding complexity at the ICTY.<sup>48</sup> It is no wonder that the written opinions are so lengthy. Moreover, the lengthiness and complexity of the proceedings, which necessitates a lengthy written judgment, has an impact in the judgment's structure; rather than having one straightforward direction starting from facts, finishing with the reasoning for the findings, the usual structure is that the case is organized around clusters, such as the crimes committed within a specific location or around counts (e.g. Crime Against Humanity – murder) or a combination of the two. In a sense, the final judgment can, at times, look like a huge conglomerate of separate judgments on specific clusters.

The second reason that international criminal judgments take the form that they do is the tradition in which international criminal courts are a part, that of international law. If we take the judgments of the ICJ as a comparison, we can see that their judgments are structured around the issues and arguments that the parties made during the procedure. The ICJ takes great pains to summarize and present the arguments of the parties in their best legal form before it goes on to deliver its judgment on every single issue that they have raised, even though it might not think of a particular argument as a good one.<sup>49</sup> It is not surprising that the international criminal tribunals have taken a similar approach in organizing their judgments, around issues and legal arguments, especially the Appeals Chamber judgments. After all, international lawyers hold international judgments, especially those of the ICJ, with reverence.

### Timeliness of Judgments

The right to a speedy trial is one of the key aspects of the right to a fair right,<sup>50</sup> something for which international criminal law has a less than stellar reputation. As the international criminal tribunals gathered steam they managed to implement certain measures that would make the process run smoother. Most notably, they moved from a party driven procedure very akin to the US model<sup>51</sup> to a more inquisitorial procedure, giving more power to the judges to manage the process and reduce the overall length of the proceedings. The ICC,

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<sup>45</sup> Articles 68 and 75 of the Rome Statute.

<sup>46</sup> ICC, *Prosecutor v Thomas Lubanga Dyilo*, No. 001/04-01-06, Judgment pursuant to Article 74 of the Statute, 14 March 2012.

<sup>47</sup> Ford p. 31

<sup>48</sup> Ibid

<sup>49</sup> For instance, Judge Simma had this to say in his separate opinion in the *Application of the Interim Accord* case: I have difficulties to view Greece's 2008 action as anything but a politically motivated attempt at coercing the FYROM to back down on the name issue. After having been brought before the Court, what the Respondent then tried *ex post facto* was to hide, somewhat desperately and with a pinch of embarrassment, this show of political force amounting to a treaty breach behind the three juridical fig leaves, presented as "subsidiary defences" by very able counsel (but *ad impossibilia nemo tenetur*). In the Judgment, these arguments got the treatment they deserved. ICJ, *Separate Opinion of Judge Simma, Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, *I.C.J. Reports 2011*, p. 644, p. 696.

<sup>50</sup> Salvatore Zappalà, *Human rights in international criminal proceedings* (Oxford University Press 2003) p. 109-115.

<sup>51</sup> When the ICTY first drafted their Rules on Procedure and Evidence they borrowed extensively from the US Federal Rules of Procedure, leaving the dynamic of the process in the hands of the parties. As it became apparent that this led to increasing the length of the proceedings numerous amendments were put in place giving more power to the judges to manage the proceedings; see *ibid* pp. 22-24.



for various reasons, including limiting the power of the prosecutor,<sup>52</sup> went further and instituted a pre-trial process of confirmation of charges, giving the power to the judges to manage the handling of the trial process, such as: setting time limits for preparation of the indictment, the submission of evidence and calling of witnesses, the possibility of eliminating unnecessary witnesses, reviewing the necessity of calling back witnesses, as well as limiting the time available for cross-examination of witnesses, among others,<sup>53</sup> powers limited by the general requirement of fairness of the proceedings.

Nevertheless, the trials themselves can be quite lengthy compared to domestic trials. Using Ford's data as an example, 68% of US Federal District Courts' trials between September 2010 to September 2011 "lasted one day or less", while "less than half of one percent – lasted more than 20 days."<sup>54</sup> This small comparison does not capture the difference in both complexity and timeliness of trials – for one thing it does not measure the time that an accused has spent in pre-trial detention, since unlike the US<sup>55</sup>, in international criminal law there is no such thing as the right to post bail. However, if certain guarantees can be made by the government where the accused is residing, then arraignments can be made for the accused to defend themselves outside custody.<sup>56</sup>

Regardless, due to the complexity of the trial process itself it can be years between the start of the trial and the rendering of the final judgment, usually after an appeal. For instance, in the *Katanga* case<sup>57</sup> the opening statements commenced on the 24 November 2009 and the trial lasted till 23 May 2012 when the closing statements finished. The written judgment on the other hand was issued on 7 March 2014 nearly two years later. There was no appeal. Moreover, this is only considering the actual trial process itself; the ICC also has a pre-trial process where the confirmation of charges takes place, which could also take some time. Similarly, with the *Lubanga* case<sup>58</sup> also at the ICC, the trial started on 26 January 2009 with the Prosecutor's opening statement and finished with the closing statements on 20 May 2011. The trial chamber verdict was issued on the 14 March 2012, 10 months after the end of the proceedings.

The length of the judgments (several hundred pages long) goes a long way in explaining the time required between the closing of the proceedings and the issuing of the final judgment. The complexity of the trial also means that the judges themselves might take longer to deliberate in order to reach an impartial and objective decision and even longer to justify that decision in writing. These factors result in months passing between the closing of the trial and rendering the final judgment. International criminal trials are quick only compared to continental drift. That said, they are also the most complex trials ever to be held, and the timeliness of the judgments reflects that.

### **Separate and Dissenting Opinions**

Article 74(3) and (5) mandate the judges of the ICC to search for unanimity in their decisions although it leaves the door open for dissenting opinions. Moreover, it also mandates that both the majority and minority views are part of the (single/combined) written decision. Consequently, the minority decisions should also follow the same rules regarding the written

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<sup>52</sup> Philippe Kirsch and John T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' [American Society of International Law] 93 The American Journal of International Law 2

<sup>53</sup> Zappalà pp. 83-115.

<sup>54</sup> Ford p.33

<sup>55</sup> Matthew J Hegreness, 'America's Fundamental and Vanishing Right to Bail' 55 Arizona Law Review 909.

<sup>56</sup> Need to cite!!!

<sup>57</sup> ICC, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Trial Chamber Judgment, 7 March 2014.

<sup>58</sup> ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber Judgment, 14 March 2012.

opinion that I outlined above, namely that they should issue a written, “reasoned statement of the [...] findings on the evidence and the conclusions”,<sup>59</sup> that it should be based on the evidence presented during the whole proceedings, and that it should not go beyond the “facts and circumstances described in the charges and any amendments to the charges.”<sup>60</sup>

The practice of issuing separate and dissenting opinions dates from the beginning of international criminal law i.e. from the International Military Tribunal of the Far East with the famous dissent issued by Justice Pal.<sup>61</sup> The tradition was continued by the ICTY and ICTR, almost without afterthought. The Secretary General’s Report on the establishment of the ICTY simply mentions it in passing by saying that “separate or dissenting opinions should be permitted.”<sup>62</sup> It is equally reflected in the short reference to that effect in the proposed Article 24 which was later adopted by the Security Council by saying that “separate or dissenting opinions may be appended”<sup>63</sup> to the judgment.

The root of the practice of having separate and dissenting opinions is again found in the international tradition of international criminal law. Separate and dissenting opinions have been a regular feature of international justice since at least the establishment of the Permanent Court of International Justice (PCIJ) in 1920.<sup>64</sup> Almost all international courts have followed this practice, the most notable exception being the Court of Justice of the European Union (CJEU).<sup>65</sup> It is surprising that this would be the case given the fact most legal jurisdictions in the world, notably those following the French-Continental system, do not have the practice of issuing separate or dissenting opinions. I have written elsewhere<sup>66</sup> that this reflects the structural realities of the international legal system and the issues of how international courts build their legitimacy and legitimize their function, which for the most part is to intrude into state sovereignty. Suffice it to say that the practice of issuing separate and dissenting opinions can have consequences on both the length of the judgment and the timeliness of delivery.

### Accessibility of judgments

The international criminal tribunals have been very careful in their attempts to make their judgments accessible to the wider public; not surprising given the fact that several of their primary functions (deterrence, the creation of a historical record, didactic function<sup>67</sup>) can be served by accessibility, transparency and dissemination of their work. Given the fragmented nature of international criminal law, especially institutionally, the different international criminal tribunals have had to accommodate several languages, however, and again due to mostly its international tradition, the most used languages (or the working languages of the

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<sup>59</sup> Article 74(5) of the Rome Statute.

<sup>60</sup> Article 74(2) of the Rome Statute.

<sup>61</sup> Dissenting Opinion of Justice Pal, International Military Tribunal for the Far East, 12 November 1948, also see William A Schabas, ‘Victor’s Justice: Selecting Situations at the International Criminal Court’ 43 *J Marshall L Rev* 535 p. 536.

<sup>62</sup> Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. No. S/25704, 3 May 1993, para. 110.

<sup>63</sup> Article 24 of the ICTY statute and paragraph 115 of the Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. No. S/25704, 3 May 1993.

<sup>64</sup> See Article 57 of the Statute of the Permanent Court of International Justice.

<sup>65</sup> For an analysis of the CJEU reasoning style see Mitchel de S. O. L’E Lasser, *Judicial deliberations: a comparative analysis of judicial transparency and legitimacy* (Oxford University Press 2009) pp. 103-141

<sup>66</sup> Marjan Ajeviski, ‘Judicial Law-making in International Criminal law—The Legitimacy Conundrum’ in *Select Proceedings of the European Society of International Law*, vol 3 (2010)

<sup>67</sup> Mirjan Damaska, ‘What is the point of international criminal justice’ 83 *Chicago-Kent Law Review* 329, talking about the overabundance of functions of international criminal law and suggesting that the didactic function should be the primary one.

institutions) are English and French. For instance, the working languages of the ICTY are English and French,<sup>68</sup> however, the proceedings are simultaneously translated in multiple languages, depending on the language of the defendants and the victims. The written judgments are also available in several languages, most certainly in the language of the accused and, in some cases, of the victims, albeit with a fewer resources available.<sup>69</sup> Similarly in the ICTR, the working languages of the Tribunal are English and French,<sup>70</sup> but almost all resources are also available in Kinyarwanda, the language of defendants and the victims.

The situation with the ICC is a bit more complicated, having been established with a treaty under with a considerable involvement by the UN. As such the official languages of the UN are also the official languages of the ICC: Arabic, Chinese, English, French, Russian and Spanish.<sup>71</sup> All “judgments [...], as well as other decisions resolving fundamental issues” are translated into the official languages.<sup>72</sup> The working languages of the court, on the other hand, are the traditional languages of international law, English and French, with the opportunity for other languages to become working languages, after a change in the Rules of Procedure and Evidence.<sup>73</sup> At the request of a party to the proceedings or a State with the right to intervene, the ICC can authorise that party to use a different language, provided they give sufficient reasons.<sup>74</sup>

Moreover, the different institutions have made great efforts to make their jurisprudence accessible to actors outside of the international field. When it comes to the ICC, the principle of complementarity means that the first jurisdiction responsible for prosecuting international crimes is the national one and the ICC can only step in if the state is unwilling or unable to carry out the investigations.<sup>75</sup> Consequently, the ICC has partnered with external organizations to create programs and strategies to make the law of the Rome Statute more accessible to national administrations. One such example is the ICC Legal Tools<sup>76</sup> database, which has as its ambition to become a one-stop-shop for issues of international criminal law – of what are the necessary elements for the different crimes in the Statute, where have these or similar issues been addressed and what type of evidence has been used. It provides a Case Matrix, an Elements Digest, and the Means of Proof Digest. Its scope goes beyond the Rome Statute itself and sees the judgments of both national and other international criminal tribunals as highly relevant for international criminal law in full. However, the ICC’s understanding of its interpretative prerogatives limits the impact that these sources can have, as I shall show in the next section.

## **Rules of Interpretation**

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<sup>68</sup> Article 33 of the ICTY statute

<sup>69</sup> For instance in the Boškoski and Tarčulovski case, nearly all of the ICTY records online are available in French, English and Macedonian (the language of the defendants) while only the key documents, such the indictment, the Trial Chamber and the Appeals Chamber judgments are in Albanian (the language of the victims); available at [http://www.icty.org/en/case/boskoski\\_tarculovski/4](http://www.icty.org/en/case/boskoski_tarculovski/4) (last visited on 1 November 2016).

<sup>70</sup> Article 31 of the ICTR statute

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatuteInternationalCriminalTribunalForRwanda.aspx> (last visited on 1 November 2016).

<sup>71</sup> Article 50(1) of the Rome Statute.

<sup>72</sup> Ibid.

<sup>73</sup> Article 50(2) of the Rome Statute.

<sup>74</sup> Article 50(3) of the Rome Statute.

<sup>75</sup> Paragraph 10 of the Preamble and Article 17(1)(a) and (b).

<sup>76</sup> For more information on the ICC Legal Tools visit <https://www.legal-tools.org/what-are-the-icc-legal-tools/> or <https://www.legal-tools.org/browse/> (last visited 02 November 2016).

Modern international criminal law has had a troubled relationship with any rules of interpretation. As Schabas has put it, international criminal law at the end of the Cold War was “an incomplete shopping list of ancient treaties.”<sup>77</sup> To say that the judges of the *ad hoc* tribunals faced a challenge would be to make a gross understatement of the task that they had to accomplish. For one thing, this shopping list was not actually the main law that the *ad hoc* tribunals had to follow. What they were tasked to do was to apply rules of international law that were, “beyond any doubt part of customary law”<sup>78</sup>, which could include the provisions from the items on the shopping list, but not necessarily. Moreover, while the treaties in question did regulate conflict and the behaviour of combatants, they were remarkably scarce when it came to elaborating criminal law notions, other than criminalizing it. For instance, while it criminalized rape, it did not exactly elaborate as to what conduct qualifies as rape, and the *ad hoc* tribunals took a meandering road in coming up with a viable definition.<sup>79</sup>

Seen as a whole, Leena Grover has noted that “such a state of affairs opened the door for judges to develop their own methods,”<sup>80</sup> either based on their own training, or their own understanding of the methods of interpretation prevalent in international law or on their “understanding of international criminal law’s normativity”<sup>81</sup> In her survey of the *ad hoc* tribunals’ case-law, she has classified several principles or lines of arguments that the tribunals have repeatedly used, such as: literal interpretation, logical interpretation, contextual interpretation, purposive interpretation, effective interpretation, drafters’ intent and progressive interpretation.<sup>82</sup>

The *ad hoc* tribunals have not escaped some stern criticism, however. In his seminal paper, *Identity Crisis*<sup>83</sup>, Robinson argued that the *ad hoc* tribunals approach to interpretation put in jeopardy the core commitment of a liberal criminal justice system. His argument was that while international criminal tribunals have made great strides towards generously interpreting the rights of the defendants during the criminal process, they have also interpreted its substantive criminal provisions quite broadly, to the detriment of those same defendants. He finds that “part of the problem lies in normative assumptions transplanted from human rights and humanitarian law”.<sup>84</sup> This has led to adopting interpretative approaches from the human rights field, making victim protection the *raison d’être* of international criminal law, moving towards expanding notions of the modes of liability of individuals, especially commanders.<sup>85</sup>

Moreover, he argued that during their interpretative efforts the judges conflated the structural differences between international criminal law and human rights and humanitarian law. Namely, he argued, that international criminal law deals with the determination of the guilt or innocence of an individual, and therefore, prescribes certain conduct as criminal or not. On the other hand, human rights and humanitarian law regulate the way that a collective, the

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<sup>77</sup> William A Schabas, ‘Interpreting the statutes of the Ad hoc tribunals’ in *Man’s Inhumanity to Man* (Kluwer Law International 2003), p. 848.

<sup>78</sup> Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. No. S/25704, 3 May 1993, para. 34.

<sup>79</sup> See the discussions on the definition of the *actus reus* for the crime of rape in the Akayesu, Furundzija and Kupreskic cases; ICTR, *Prosecutor v. Jean-Paul Akayesu* ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998; ICTY, *Prosecutor v. Anto Furundzija*, IT-95-17/1-T, Trial Chamber Judgment, 10 December 1998; ICTY, *Prosecutor v. Kupreskic et al.*, IT-95-16-T, Trial Chamber Judgment, 14 January 2000.

<sup>80</sup> Leena Grover, *Interpreting crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press 2014) p.48.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid pp. 49-64.

<sup>83</sup> Darryl Robinson, ‘The Identity Crisis of International Criminal Law’ [Cambridge Journals Online] 21 Leiden Journal of International Law 925.

<sup>84</sup> Ibid p. 927.

<sup>85</sup> Ibid pp. 933-946.

state or a group, treats individuals or the way that two collectives behave during hostilities. One is directed towards individuals, the other towards collectives for the protection of individuals. Consequently, Robinson argues, it makes sense that human rights and humanitarian law have different modes of responsibility with different thresholds as well as different remedies and borrowing from one into the other should be taken with a lot of salt.<sup>86</sup>

Lastly, he argued that the influence of ideological assumptions of human rights and humanitarian law in the interpretation of international criminal law can undermine its commitment to the principles of a liberal criminal justice system. Human rights and humanitarian law discourse is ripe with talk about progress in the protection of rights and the erosion of sovereignty, making notions about interpretation of rights' conventions as "living instruments" quite acceptable.<sup>87</sup> On the other hand, in criminal law stability, predictability and strict legality make the core of the assumptions regarding the interpretation of the law. If one supplants the other it can unleash severe – and arbitrary – intrusions into an individual's autonomy by a collective entity, something that liberal criminal law is designed to stop.<sup>88</sup>

This critique<sup>89</sup> was taken to heart by the ICC's judges in their interpretative endeavours. Granted they were in a much better position than the early *ad hoc* tribunals ever were; for one they had a much more detailed statute which was negotiated with a wide participation of states.<sup>90</sup> It was given clear guidelines regarding the hierarchy of law that they are supposed to follow;<sup>91</sup> it has institutions that are designated to look after the development of the law, relieving some of the pressures regarding progressive updates of the law; and most importantly, those same institutions have the power to enact supplementary texts (such as the Elements of Crimes or the Rules of Procedure and Evidence) that help the judges in the interpretation of the statute.<sup>92</sup>

In addition, Article 22(2) codifies the principle of strict construction, which the ICC has interpreted to mean that "it sets a further restriction on the bench's role of interpretation by requiring it, upon completion of its analysis, to discard any meaning derived from a broad interpretation that is to the detriment of the accused."<sup>93</sup> Moreover, clearly answering to Robinson's critic, the Trial Chamber in the *Katanga* case also noted that

the aim of the Statute, *viz.* to put an end to impunity for the perpetrators of the most serious crimes within the jurisdiction of the Court, can under no circumstance be used to create a body of law extraneous to the terms of the treaty or incompatible with a purely literal reading of its text.<sup>94</sup>

Currently, the ICC's approach to interpretation is clearly outlined in the *Bemba* Judgment: it sees as its hierarchy of laws to start with the Statute, the Elements of Crimes and the Rules of Procedure and Evidence as primary sources.<sup>95</sup> Should these sources turn out to be ambiguous then the Court will turn to its supplementary sources which include "applicable treaties and principles and rules of international law"<sup>96</sup> which it interprets to refer to customary

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<sup>86</sup> Ibid pp. 946-955.

<sup>87</sup> For e.g. see George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' 21 European Journal of International Law 509

<sup>88</sup> Robinson pp. 956-961.

<sup>89</sup> It was even cited in the *Katanga* judgment, para. 54 (footnote 97).

<sup>90</sup> José E. Alvarez, *International organizations as law-makers* (Oxford University Press 2005), pp. 277-295

<sup>91</sup> Article 21 of the Rome Statute.

<sup>92</sup> For the powers of the Assembly of Parties see especially Articles 9, 51 and 122 of the Rome Statute.

<sup>93</sup> *Katanga* case, para 50.

<sup>94</sup> *Ibid*, para. 55.

<sup>95</sup> *Bemba* case para. 66-68.

<sup>96</sup> Article 21(1)(a) of the Rome Statute.

international law.<sup>97</sup> Moreover, it also notes that “the case law of other international courts and tribunals [...] is not binding”<sup>98</sup> while it also recognizes that it can be useful “where relevant and appropriate”.<sup>99</sup> Having a hierarchy of sources is a marked difference to most other international courts, who have to balance between treaties, customs and general principles as equal sources of law.

When it comes to having an actual method of interpretation, the ICC has consistently upheld Article 31 of the Vienna Convention of the Law of Treaties (VCLT) as the main, if not only, method of interpretation.<sup>100</sup> Article 31(1) VCLT states that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>101</sup> The ICC, following the mainstream understanding<sup>102</sup> of Article 31 VCLT, considers it to represent a single rule of interpretation consisting of three elements (ordinary meaning, context, and object and purpose) which “must be applied together and simultaneously, rather than individually and in a hierarchical or chronological order.”<sup>103</sup> Moreover, the single rule, thanks to the phrase “good faith”, is taken to also include the principle of effectiveness “requiring the ... [ICC] to dismiss any interpretation of the applicable law that would result in disregarding or rendering any other of its provisions void.”<sup>104</sup>

However, we should not consider the ICC acknowledgment of the principle of effectiveness as an invitation to any expansive reading of the Rome Statute. Quite the contrary, it has consistently stressed that the Court “cannot adopt an interpretation method that would broaden the definition of crimes, and it is bound to adhere to the letter of the provisions aimed at reprimanding only conduct the drafters expressly intended to criminalise”<sup>105</sup> and that any lingering ambiguity “must be resolved in a manner that is in favour of the ... [defendant].”<sup>106</sup> Finally, it has consistently stressed its obligation under Article 21(3), namely, that any interpretation of the Rome Statute must conform to “internationally recognised human rights norms.”<sup>107</sup> As it currently stands, the rights of the defendant are fairly well entrenched in the Rome Statute in numerous provisions and the link between the rights of the defendant and international human rights is fairly well established. However, it is unclear whether international human rights standards will be a framework that will *only* be used in interpreting the rights of defendants or whether that framework will extend to the other side of the equation, leading to the same type of problems as outlined in Robinson’s *Identity Crisis*, for the simple reason that there are too few cases to tell.

### **Conclusions: Quality of Judicial Reasoning in International Criminal Courts**

It is hard to give an assessment of the quality of judicial reasoning in international criminal courts because they are a bit of an odd duck even among the odd ducks of international

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<sup>97</sup> *Bemba* case para 71.

<sup>98</sup> *Ibid.*, para 72.

<sup>99</sup> *Ibid.*, para. 71.

<sup>100</sup> *Ibid.*, para. 77; also see *Katanga* 43-49; *Lubanga*, para. 601.

<sup>101</sup> Article 31(1) of VCLT, United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331

<sup>102</sup> M. Fitzmaurice, O. A. Elias and Panos Merkouris (eds), *Treaty interpretation and the Vienna Convention on the Law of Treaties: 30 years on* (Martinus Nijhoff Publishers 2010); Richard K. Gardiner, *Treaty interpretation* (Oxford University Press 2010).

<sup>103</sup> *Bemba* case, para. 77.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*, para. 83.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*, para 82.

courts. They are not designed as typical international courts, nor are they expected to function as typical international courts, either. Yet they are not national courts and do not have the luxury of operating within a relatively stable legal environment. Quite the opposite, if there is one thing that is the hallmark of the beginning of the modern era of international criminal law it is its *ad hoc-ishness*. Thrown into the turbulent waters of an emerging international law branch the *ad hoc* criminal tribunals had to make up a lot of things as they went along. While the judges at the ICTY and ICTR could lean on established international law traditions, they also had to adapt those same traditions to fit the format of a criminal law trial. As we have seen from Robinson's critique, while they did an excellent job in most areas, they also made some quite questionable choices.

Twenty years into the future, the ICC is in a much better position. While the complexity of international criminal trials is, to a large extent, out of the ICC's control (the complexity of the trial reflects the complexity of the situation that it addresses), thanks to the *ad hoc* tribunals, it has the mechanisms and the experience to manage it. Moreover, while the ICC has said that the jurisprudence of other international tribunals is only a supplementary source of interpretation it is, without a doubt, an invaluable trove of information, of what arguments work and what do not, which claim is acceptable and which one is not, and most importantly, what the law on this or that particular issue is. While the ICC will still struggle to deliver a timely judgment, it has at its disposal twenty years of experience gathered by the *ad hoc* tribunals in managing cases, issuing written judgments and navigating a complex legal and political system. It might be a bit too early to issue a concrete judgment on the quality of reasoning at the ICC, after all there are less than a handful of completed cases yet (cases that have finished with a complete trial phase), however, given the situations that it deals with, it is doing as well as it can be expected. We shouldn't let the perfect be the enemy of the good.

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